

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA

JOHNNIE C. WHITE,  
Plaintiff,

v.

KENNETH PAUL SMITH AND  
DANIEL MARK FOZZARD.,  
Defendants.

Case No. C06-5170RBL

REPORT AND  
RECOMMENDATION

**Noted for September 22<sup>nd</sup>, 2006**

This action, brought pursuant to 42 U.S.C. 1983, has been referred to the undersigned Magistrate Judge pursuant to Title 28 U.S.C. § 636(b)(1)(B). The court ordered plaintiff to show cause why this action should not be dismissed as the facts alleged appear to be intertwined with his conviction. (Dkt. # 6). Plaintiff asked for, and received, an extension of time to file a response. (Dkt. # 7 and 8). Plaintiff has not responded.

FACTS

Plaintiff names two Tacoma City Police Officers as defendants, and alleges excessive force was used in arresting him on September 23<sup>rd</sup>, 2004. While plaintiff alleges he offered no resistance to his arrest, plaintiff was convicted of two counts of third degree assault. One count with regard to defendant Officer Smith and one count with regard to defendant Officer Fozzard. (Dkt. # 5, page Report and Recommendation - 1

12).

The court ordered plaintiff to show cause why this action should not be dismissed as the facts alleged appear to be intertwined with his conviction. (Dkt. # 6). Plaintiff did not file a response to the order to show cause. On June 13<sup>th</sup>, 2006 plaintiff asked that he be given "the most time possible" to complete a response. (Dkt. # 7). Plaintiff was nearly two months, until August 11<sup>th</sup>, 2006, to have a response filed. As of August 28<sup>th</sup>, 2006 nothing has been filed.

#### DISCUSSION

Nothing has been filed as of August 28<sup>th</sup>, 2006. The court therefore recommends this action be **DISMISSED WITH PREJUDICE** and with the dismissal counting as a strike pursuant to the Prison Litigation Reform Act, 28 U.S.C. 1915 (g). Plaintiff has failed to cure the deficiencies in this action despite being given opportunity to do so. He has also failed to respond to a court order. A proposed order accompanies this Report and Recommendation.

Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal rules of Civil Procedure, the parties shall have ten (10) days from service of this Report to file written objections. *See also* Fed. R. Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the time limit imposed by Rule 72(b), the clerk is directed to set the matter for consideration on **September 8<sup>th</sup>, 2006**, as noted in the caption.

DATED this 28<sup>th</sup>, day of August, 2006.

/s/ J. Kelley Arnold  
J. Kelley Arnold  
United States Magistrate Judge